UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Public Citizen, Inc.	)	
	)	
v.	)	Docket No. EL15-70-000
	)	
Midcontinent Independent System Operator, Inc.,	)	
	)	
The People of the State of Illinois, By Illinois Attorney General Kwame Raoul,[1]	)	
	)	
v.	)	Docket No. EL15-71-000
	)	
Midcontinent Independent System Operator, Inc.,	)	

MOTION OF THE PEOPLE OF THE STATE OF ILLINOIS, by ILLINOIS ATTORNEY GENERAL KWAME RAOUL, AND PUBLIC CITIZEN, INC. ON REMAND REQUSTING REFUNDS OR AN EVIDENTIARY HEARING TO REFUND UNJUST AND UNREASONABLE CHARGES FROM THE MISO 2015-2016 PLANNING RESOURCE AUCTION FOR ZONE 4

On August 6, 2021, the United States Court of Appeals for the District of Columbia Circuit remanded this matter to the Commission for further analysis and explanation, holding that "the Commission's orders did not adequately explain its conclusion that the 2015 Auction results in Zone 4 were just and reasonable given the evidentiary record and the Commission's own findings in the 2015 Order."[2] Upon remand, and pursuant to Sections 205,[3] 206,[4] and 222[5] of the Federal Power Act ("FPA" or the "Act") and Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"),[6] the People of the State of Illinois (the "People"), by Kwame Raoul, Illinois Attorney General, and Public Citizen,

[1] Kwame Raoul, the current Attorney General of the State of Illinois, is substituted for Lisa Madigan.
[2] *Pub. Citizen, Inc. v. Fed. Energy Regulatory Comm'n*, 7 F.4th 1177, 1200 (D.C. Cir. 2021).
[3] 16 U.S.C. § 824d.
[4] *Id.* at § 824e.
[5] *Id.* at § 824v.
[6] 18 C.F.R. § 385.212.

Inc. ("Public Citizen") move that the Commission find that the result of the Midcontinent Independent System Operator, Inc. ("MISO") 2015-2016 Planning Resource Auction ("PRA") for Zone 4, which serves a portion of the State of Illinois, was unjust and unreasonable due to certain MISO rules that the Commission previously determined were unjust and unreasonable and due to market manipulation enabled by those rules. The People and Public Citizen request that the Commission order refunds to Illinois consumers.

INTRODUCTION AND FACTUAL BACKGROUND

A full statement of the factual background as described in the complaints and supporting affidavits is attached as Exhibit 1 to this Motion. The facts already in the record and prior Commission orders demonstrate that (1) the Commission concluded in its December 31, 2015 order ("December 2015 Order") that rules contained in MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (the "Tariff") governing the Initial Reference Level ("IRL") and Local Clearing Requirement ("LCR") were not just and reasonable,[7] and (2) Dynegy, Inc. ("Dynegy"), now part of Vistra Energy Corp. ("Vistra"), exploited these unjust and unreasonable rules and its pivotal supplier status to manipulate the clearing price in Zone 4 during the 2015-2016 PRA, resulting in rates paid by Illinois consumers that were excessive, non-competitive, and unjust and unreasonable.

Appeal and Remand

1. In its July 19, 2019 order ("July 2019 Order"), the Commission declined the requests of Public Citizen; the People; Southwestern Electric Cooperative, Inc. ("Southwestern"); and the Illinois Industrial Energy Consumers ("IIEC") (collectively, the

[7] *See Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,385, at ¶¶ 85–101, 145–151 (2015) (hereinafter, "December 2015 Order").

"Complainants") to hold an evidentiary hearing regarding the 2015-2016 PRA.[8] The Commission also declared that the results of the auction were just and reasonable, even though the IRL and LCR rules contained in the Tariff that the Commission found to be unjust and unreasonable for future PRAs in the December 2015 Order also applied to the 2015-2016 PRA.[9]

2. Upon denial of its rehearing request,[10] Public Citizen appealed to the United States Court of Appeals for the District of Columbia Circuit.[11] The court remanded the case, finding that the Commission failed to adequately explain two of its conclusions. First, the court found that the Commission failed to adequately reconcile its conclusion that the Tariff was no longer just and reasonable for future MISO auctions with its finding that the results of the 2015-2016 PRA were just and reasonable.[12] Second, the court stated that the Commission did not adequately explain its conclusion that market manipulation did not render the 2015-2016 PRA results unjust and unreasonable.[13]

3. As to the first faulty conclusion, the court criticized the Commission for not explaining why it did not apply the holdings of the December 2015 Order to the 2015-2016 PRA. In the December 2015 Order, the Commission found that the Tariff's IRL, a measure designed to estimate the opportunity cost of exporting capacity to the PJM Interconnection ("PJM"), did not appropriately measure opportunity cost, and thus was no longer just and reasonable for future auctions.[14] The Commission listed three reasons for its conclusion, but the court noted that only

[8] *Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042, at ¶ 2 (2019) (hereinafter, "July 2019 Order").
[9] *Id.*
[10] *See Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,227 (2020) (hereinafter, "March 2020 Order").
[11] *See Pub. Citizen, Inc. v. Fed. Energy Regulatory Comm'n*, 7 F.4th 1177 (D.C. Cir. 2021).
[12] *Id.* at 1196–98.
[13] *Id.* at 1198–1200.
[14] *See* December 2015 Order, 153 FERC ¶ 61,385, at ¶¶ 86–92.

one of the rationales solely applied to future auctions.[15] As stated by the court, "[t]he Commission, in short, rested its invalidation of the [T]ariff in material part on evidence that, on its face, applies just as much to the 2015[-2016 PRA] as to future auction years."[16]

4. Similarly, the court further stated that the Commission failed to explain why the Commission's finding that the LCR calculation was no longer just and reasonable did not also implicate the justness and reasonableness of the 2015-2016 PRA.[17] The Commission found in the December 2015 Order that MISO's Tariff improperly calculated the LCR, or the amount of local capacity that MISO considers sufficient to meet reliability standards, because MISO did not account for counter-flows that brought capacity into MISO when generators located in MISO exported capacity into PJM.[18] The Commission ordered that the LCR calculation be updated for future auctions, but said nothing about the reasonableness of its use for the 2015-2016 PRA.[19]

5. Regarding the second faulty conclusion, the court held that the Commission did not sufficiently explain why it found that Dynegy did not manipulate the 2015-2016 PRA. In the July 2019 Order, about four years after the complaints in this consolidated dockets were filed and the question of market manipulation was forwarded to the Commission's Office of Enforcement, the Commission stated that Dynegy did not manipulate the 2015-2016 PRA because "MISO conducted the 2015/16 Auction in compliance with the MISO Tariff, including the Tariff provisions pertaining to Dynegy's offers in the Auction, that were designed to mitigate the exercise of market power and result in a just and reasonable rate."[20] In other words, the Commission concluded that the results of the 2015-2016 PRA for Zone 4 were just and

[15] *Pub. Citizen, Inc.*, 7 F.4th at 1197.
[16] *Id.*
[17] *Id.* at 1198.
[18] *See* December 2015 Order, 153 FERC ¶ 61,385, at ¶¶ 145–151.
[19] *See id.*
[20] July 2019 Order, 168 FERC ¶ 61,042, at ¶ 84.

reasonable, even with a clearing price more than 40 times higher that of the other zones, because MISO conducted the auction in line with its faulty Tariff and Dynegy did not violate any rule contained in the faulty Tariff. Then Commissioner, now Chairman, Glick dissented, writing, "the fact that MISO and the individual market participants appear to have followed the relevant tariff language does not respond to allegations that the resulting rates are unjust and unreasonable as a result of market manipulation."[21]

6. The court agreed with Chairman Glick and concluded that the Commission's denial was insufficient. It stated that "because the record evidence raised a substantial question of whether the tariff provisions had adequately mitigated exercises of market power or market manipulation in the 2015 Auction, the Commission could not rely reactively on compliance with a hobbled tariff as the lodestar of competitiveness."[22] The court then remanded the case for further proceedings.

7. Now that this case has been remanded, the Commission should conclude that the record adequately and clearly demonstrates that the results of the 2015-2016 PRA (1) were not just and reasonable because of the reasons stated in the December 2015 Order; and (2) that Dynegy, as a pivotal supplier, exploited the unjust and unreasonable IRL and LCR rules formerly contained in MISO's Tariff to manipulate prices in Zone 4 far beyond just and reasonable levels. The People and Public Citizen request that the Commission order Dynegy to disgorge its unlawful profits and refund $120,805,520.22, plus interest from June 1, 2015, to load serving entities in Illinois in MISO Zone 4 for refund to their customers.

[21] *Id.* ¶ 2 (Glick, Comm'r, dissenting).
[22] *See Pub. Citizen, Inc*, 7 F.4th at 1200.

ARGUMENT

MISO's Tariff Allowed Dynegy to Engage in Market Manipulation, which Produced an Unjust and Unreasonable Rate in Zone 4 in Illinois.

8. At the time of the 2015-2016 PRA, Dynegy was a pivotal supplier in Zone 4, which allowed it to exercise market power and set the capacity clearing price in the zone. Prior to the 2015-2016 PRA, the Commission approved the sale of four power plants located in Zone 4 to a subsidiary of Dynegy,[23] thereby allowing Dynegy to control 6,400 MW in Zone 4.[24] For the 2015-2016 PRA, MISO identified 13,481.8 MW of total unforced capacity in Zone 4 and calculated the LCR at 8,852 MW.[25] This meant that without Dynegy's capacity, there were only 7,081 MW available to meet the 8,852 MW LCR, thus making Dynegy a pivotal supplier. Dynegy's pivotal supplier status was further bolstered by the faulty LCR rules which failed to account for counter-flows. Thus, Dynegy's capacity was required for Zone 4 to clear and the amount of capacity that Dynegy was required to offer for Zone 4 to clear was artificially high because of MISO's failure to properly recognize counter-flows.

9. Dynegy's pivotal supplier status allowed it to exercise market power which was not limited by MISO's market power mitigation rules. Rather, MISO's Tariff enabled, rather than constrained, Dynegy's market manipulation. MISO's Conduct-Impact Test contained in the Tariff and designed to limit the exercise of market power allowed Dynegy to pick its clearing price between $0.00/MW-day and the Conduct Test threshold of $180.53/MW-day without mitigation. The two-part test instructed MISO's Independent Market Monitor ("IMM") to reduce any uncompetitive offer down to the IRL (the opportunity cost of offering the capacity into PJM). Specifically, the IMM would mitigate an offer only if it exceeded the Conduct Test

[23] *See Ameren Energy Generating Co.*, 145 FERC ¶ 61,034 (2013).
[24] McCullough Aff. ¶ 23.
[25] *Id.* ¶¶ 20, 23.

threshold, which was calculated by adding to the IRL 10% of the Cost of New Entry.[26] However, the IRL calculation contained in the Tariff did not accurately measure opportunity cost, as described in the December 2015 Order, and pegged the Conduct Test threshold at an extremely high offer point, $180.53/MW-day, meaning that almost no offer would be mitigated. The Commission corrected this problem in the December 2015 Order by setting the new Conduct Test threshold at around $25/MW-day, ensuring that the IMM would review offers above this price to determine if they were uncompetitive.[27] However, prior to this correction, Dynegy took advantage of MISO's lax market power mitigation provisions by submitting absurdly high offers for capacity up to, but not exceeding, the $180.53/MW-day Conduct Test threshold, and with knowledge that its bids would set the clearing price due to its pivotal supplier status. Neither MISO nor its IMM could mitigate this offer under MISO's Tariff.

10. Dynegy's offers constituted market manipulation because they did not reflect the company's true costs to provide capacity. For example, Dynegy's bids in the 2015-2016 PRA were dramatically higher than the bids it simultaneously offered in PJM's capacity market for Illinois Power Marketing generating plants. From July 2014 to March 2015 (immediately preceding the 2015-2016 PRA held in April 2015), Dynegy's subsidiary, Illinois Power Holdings, through its marketing arm Illinois Power Marketing Company d/b/a Homefield Energy, offered capacity into PJM at a price between $5.54/MW-day and $25.51/MW-day.[28] Meanwhile, Dynegy chose to bid 651 MW at $150.00/MW-day and another 2,775 MW at $167.00/MW-day during the 2015-2016 PRA,[29] with both bids slightly below the Conduct Test

[26] MISO, FERC Electric Tariff, Module D, § 64.1.2d (32.0.0).
[27] *See* December 2015 Order, 153 FERC ¶ 61,385, at ¶¶ 93–96.
[28] McCullough Aff. ¶ 31.
[29] July 2019 Order, 168 FERC ¶ 61,042, at ¶ 84.

threshold of $180.53/MW-day. This means that Dynegy's highest PJM offer during the lead-up to the 2015-2016 PRA was one-sixth of the clearing price the company set for Zone 4.

11. Dynegy's bids were also substantially higher than the bids it offered in the 2014-2015 PRA one year earlier. As shown by IIEC and its expert James Dauphinais, Dynegy offered 4,910 MW of capacity in the 2014-2015 PRA.[30] Of this amount, 1,995 MW were self-scheduled, and Dynegy offered the remaining 2,915 MW (or 59%) at a price between slightly under $100.00/MW-day and approximately $120.00/MW-day.[31] However, in the following year, Dynegy significantly increased the price of its bids and offered 3,426 MW, or 64% of its bid capacity, at or above $150.00/MW-day.[32] Thus, Dynegy significantly increased its capacity bids to non-competitive levels in just one year.

12. Further, in the 2015-2016 PRA, Dynegy's bids were also much higher than the bids offered by other suppliers. Dynegy offered 270 MW of capacity at $108/MW-day, 651 MW of capacity at $150/MW-day, and 2,775 MW of capacity at $167/MW-day in the 2015-2016 PRA, for a total of 3,696 MW offered at or above $100/MW-day.[33] In comparison, in the other MISO zones, out of 86,476 MW offered, all other suppliers offered only 218 MW of capacity at or above $100.00/MW-day.[34] This meant that Dynegy offered 94% of capacity offered at or above $100/MW-day across all zones and nearly 17 times more capacity bid at or above $100.00/MW-day than all other suppliers in the other zones.

13. These bids were not fair offers and were intentionally designed to maximize Dynegy's revenue and take advantage of its pivotal supplier status. As explained by IIEC

[30] Dauphinais Aff., Attach. 9.
[31] *Id.*
[32] *See* Dauphinais Aff., Attach. 10; July 2019 Order, 168 FERC ¶ 61,042, at ¶ 84.
[33] July 2019 Order, 168 FERC ¶ 61,042, at ¶ 84.
[34] Whited Aff. ¶ 24.

witness Dauphinais, if Dynegy had perfect foreknowledge of the PRA results, it could have manipulated the results through its capacity bids to earn a maximum revenue of $36.425 million.[35] Dynegy achieved 83% of this possible revenue, receiving $30.354 million.[36] In addition to owning more than 50% of the LCR in Zone 4, Dynegy had access to significant resources that enabled it to structure bids to maximize its revenue, including: (1) past auction results, (2) recent generator interconnection data, (3) preliminary LCR, (4) the IRL and Conduct Test threshold, and (5) a preliminary estimate of capacity available in all zones.[37]

14. Dynegy's actions outside of the 2015-2016 PRA also show that it intended to manipulate the auction. As explained by Southwestern witness Chiles, Dynegy forcefully pushed back on a MISO proposal to combine Zones 4 and 5 prior to the 2015-2016 PRA, which would have diluted Dynegy's market power by increasing the amount of capacity available in the zone not owned by Dynegy.[38]

15. Section 222 of the Act makes market manipulation illegal and states that it is unlawful for any entity "to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance" in contravention of the Commission's rules.[39] In turn, the Commission's rules make it unlawful, in connection with the purchase or sale of electricity or transmission services, to (1) "use or employ any device, scheme, or artifice to defraud," (2) "make any untrue statement of a material fact or . . . omit to state a material fact necessary in order to make the statements made, in the light of the circumstances

[35] *See* Dauphinais Aff. ¶ 28; Dauphinais Aff., Attach. 12.
[36] *See* Dauphinais Aff. ¶ 28; Dauphinais Aff., Attach. 12.
[37] Dauphinais Aff. ¶ 29.
[38] Chiles Aff. ¶ 6.
[39] 16 U.S.C. § 824v(a).

under which they were made, not misleading," or (3) "engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity."[40]

16. Dynegy engaged in market manipulation under the Act by structuring its offers to maximize profit and by offering bids greatly in excess of a competitive offer. Dynegy's uncompetitive offers were allowed to set the clearing price because of Dynegy's pivotal supplier status and MISO's weak market power mitigation rules and improperly calculated LCR. As a result, Dynegy's strategic bidding impaired, obstructed, and defeated a competitive outcome for the Zone 4 in the 2015-2016 PRA. In the end, Dynegy created a Zone 4 clearing price that was more than 40 times more expensive than the highest clearing price in the other MISO zones, without regard to cost or market competitiveness.

17. Moreover, contrary to the Commission's July 2019 Order, Dynegy engaged in market manipulation even though it complied with the then operative MISO Tariff. As then-Commissioner Glick noted, the Commission and courts have repeatedly held that a party need not violate a tariff to be guilty of market manipulation.[41] The Commission has also explained that "tariffs cannot be written to prohibit all possible fraudulent behavior as '[t]he methods and techniques of manipulation are limited only by the ingenuity of man.'"[42] As a result, the Commission must examine each allegation of market power and manipulation individually in light of the specific circumstances presented.

18. On remand, the People and Public Citizen request that the Commission apply its findings from the December 2015 Order to the undisputed facts and conclude that the results of

[40] 18 C.F.R. § 1c.2.
[41] July 2019 Order, 168 FERC ¶ 61,042, at ¶ 2 (Glick, Comm'r, dissenting); *see, e.g.*, *Houlian Chen*, 151 FERC ¶ 61,179, at ¶¶ 120–121 (2015) (finding that a party violated the Anti-Manipulation rule even though its conduct was not explicitly barred under PJM's tariff).
[42] *Houlian Chen*, 151 FERC ¶ 61,179, at ¶ 120 (2015) (alteration in original) (quoting *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971)).

the 2015-2016 PRA were not just and reasonable due to clear market manipulation by Dynegy that pushed the charges well above competitive, and just and reasonable levels.

The Commission May Order Refunds to Consumers Once It Makes a Finding of Market Manipulation.

19. The Commission should conclude that Dynegy manipulated the 2015-2016 PRA and, thereafter, order Dynegy to provide refunds to Illinois consumers who overpaid for capacity. In general, the Commission does not rerun completed capacity auctions when it determines that past auctions are unjust and unreasonable.[43] Largely, this is due to the complications inherent in rerunning an already completed auction—such as the possibility of some generators having to return payment for services already provided.[44]

20. However, the Commission does grant retroactive relief in the form of refunds to customers when it finds that market manipulation occurred. In these cases, the Commission orders the manipulating party to pay for these refunds by assessing a civil penalty and ordering disgorgement of unjust profits. This style of relief does not present the same concerns inherent in rerunning an auction because a single party is responsible for providing restitution to ratepayers with the market results being left in place. For example, the Commission ordered Constellation Energy Commodities Group ("Constellation") to pay a civil penalty of $135 million and disgorge unjust profits of $110 million after the Commission concluded that Constellation manipulated the New York Independent System Operator and ISO-New England's day-ahead markets.[45] As part of this order, the Commission set up a fund where state agencies

[43] *See PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252, at ¶ 55 (2017).
[44] *See id.* ¶ 56.
[45] *See Constellation Energy Commodities Group, Inc.*, 138 FERC ¶ 61,168 (2012).

could request money to provide refunds to consumers who paid higher electricity prices as a result of Constellation's manipulation.[46]

21. Even in situations where the Commission has not directly set up a fund, it has routinely ordered parties that manipulated regulated markets to pay civil penalties and return any unjust profits to injured parties. For example, the Commission commanded parties accused of manipulating congestion transactions in PJM to pay a civil penalty and return unjust profits to PJM and then directed PJM to establish a methodology to distribute the unjust profits to injured market participants in such a way that matches what the participants "would have received . . . in the absence of Respondents' activity during the Manipulation Period."[47] Similarly, the Commission recently ordered GreenHat Energy, LLC to pay a civil penalty of approximately $180 million and to return unjust profits of $13 million to PJM for allocation to members harmed by the company's manipulation of PJM's Financial Transmission Rights market.[48]

22. Here, the Commission should utilize its authority to direct Dynegy (and, by extension, its successor Vistra) to provide restitution to Illinois customers who overpaid for capacity because of Dynegy's manipulation of the MISO 2015-2016 PRA.

SUMMARY AND REQUEST FOR RELIEF

23. The MISO rules that governed the 2015-2016 MISO PRA for Zone 4 violated Sections 205, 206, and 222 of the Act, 16 U.S.C. §§ 824d, 824e, and 824v, by failing to address the market power of the pivotal supplier in Zone 4 and by adopting conditions that enabled the pivotal supplier to exercise anti-competitive market power and drive the capacity price in Zone 4

[46] *Id.* ¶ 22.
[47] *Houlian Chen*, 151 FERC ¶ 61,179, at ¶ 193 (2015).
[48] *GreenHat Energy, LLC*, 177 FERC ¶ 61,073, at ¶¶ 306, 309 (2021).

to a level that was not just and reasonable, was not competitive, and was grossly above that supplier's internal cost.

24. The People and Public Citizen estimate that the financial impact and burden created by the actions and inactions described above equal no less than $120 million. Damages caused by Dynegy's exercise of market power are equal to the difference between the $150.00/MW-day clearing price in Zone 4 and the $3.48/MW-day clearing price present in all other zones in the 2015-2016 PRA that would have also been present in Zone 4 without market manipulation, or $120,805,520.22.[49] Interest on that balance should be applied for each year beginning June 1, 2015. Dynegy, as the party that manipulated the 2015-2016 PRA, should be solely responsible for this refund to load serving entities, who will then be responsible to forward this refund in the appropriate amounts to their Illinois customers.

25. Vistra is liable for Dynegy's actions in the 2015-2016 PRA because it is the surviving corporation from the merger of Dynegy and Vistra. Under the merger agreement executed by the parties, "all of the property, rights, privileges, powers and franchises of [Dynegy] shall vest in [Vistra] (as the Surviving Corporation), and all debts, liabilities and duties of [Dynegy] shall become the debts, liabilities and duties of [Vistra] (as the Surviving Corporation)."[50] Moreover, both Delaware and Illinois law provide that when two companies merge that the surviving corporation (i.e., Vistra) shall be responsible and liable for all the liabilities of the merged corporations.[51]

26. WHEREFORE, the People and Public Citizen request that:

[49] McCullough Aff. ¶ 34 ($150.00/MW-day – $3.48/MW-day) x 2,258.9 MW x 365 = $120, 805,520.22).
[50] *See* Dynegy, Inc., Joint Application for Authorization for Merger of Jurisdictional Assets and Purchase of Securities under Sections 203(a)(1) and 203(a)(2) of the Federal Power Act, Docket No. EC18-23-000, Ex. I, at § 2.4 (filed Nov. 22, 2017).
[51] Del. Code Ann. tit. 8, § 259 (Delaware); 805 ILCS 5/11.50(a)(5) (Illinois).

a. The Commission conclude that the rate resulting from the 2015-2016 MISO PRA for Zone 4, effective June 1, 2015, was not just and reasonable pursuant to Sections 205 and 206 of the Act, 16 U.S.C. §§ 824d, 824e.

b. The Commission conclude that Dynegy unlawfully manipulated the 2015-2016 PRA pursuant to Section 222 of the Act, 16 U.S.C. § 824v, to maximize its revenue without regard to market fundamentals such as supply and demand and acted "for the purpose of impairing, obstructing or defeating a well-functioning market."[52]

c. The Commission enter an order pursuant to Section 206 of the Act, 16 U.S.C. § 824e, requiring Vistra to refund to Zone 4 load serving entities $120,805,520.22, plus interest since June 1, 2015.

d. The Commission establish a refund date pursuant to Section 206(b) of the Act, 16 U.S.C. § 824e(b), of June 1, 2015, which is after the date that the People and Public Citizen's complaints were filed.

e. If the Commission declines to find the rates resulting from the 2015-2016 PRA for Zone 4 to be unjust and unreasonable upon this Motion, the People and Public Citizen request that Commission set the matter for discovery and evidentiary hearing.

CONCLUSION

27. The People and Public Citizen request that the Commission grant the relief requested herein.

[52] *Prohibition of Energy Mkt. Manipulation*, 114 FERC ¶ 61,047, at ¶50 (2006).

Respectfully submitted,

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By: __/s/ Susan Satter_____

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CERTIFICATE OF SERVICE

The undersigned certifies that she has filed with the Commission on its electronic filing system this Motion and Attachment and that she served the same upon the following by electronic mail.

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Exhibit 1

UNITED STATES OF AMERICA
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SUMMARY OF THE RECORD IN SUPORT OF THE MOTION OF THE PEOPLE OF THE STATE OF ILLINOIS, by ILLINOIS ATTORNEY GENERAL KWAME RAOUL, AND PUBLIC CITIZEN ON REMAND REQUSTING REFUNDS OR AN EVIDENTIARY HEARING DUE TO UNJUST AND UNREASONABLE CHARGES FROM THE MISO 2015-2016 PLANNING RESOURCE AUCTION FOR ZONE 4

In support of their Motion that the Federal Energy Regulatory Commission (the "Commission") find that the result of the Midcontinent Independent System Operator, Inc. ("MISO") 2015-2016 Planning Resource Auction ("PRA") for Zone 4, which serves a portion of the State of Illinois, was unjust and unreasonable and order refunds to Illinois consumers, the People of the State of Illinois (the "People"), by Kwame Raoul, Illinois Attorney General, and Public Citizen, Inc. ("Public Citizen") submit this Summary of the Record. This exhibit is based solely on documents contained in the record and the Commission's prior orders and is offered to provide background and the factual predicate for the People and Public Citizen's Motion.

1. As described in the People and Public Citizen's complaints, the capacity prices set in the MISO 2015-2016 PRA for Zone 4 separated from the rest of MISO. The price per

[1] Kwame Raoul, Attorney General of the State of Illinois, is substituted for Lisa Madigan.

megawatt-day for capacity in Zone 4 increased from $16.75/MW-day for the 2014-2015 PRA to $150.00/MW-day for the 2015-2016 PRA.[2] The $150.00/MW-day clearing price was more than 40 times more expensive than the highest clearing price ($3.48/MW-day) in the other eight MISO zones and close to nine times higher than the Zone 4 clearing price in 2014-2015.[3] Zone 4's price increase was not caused by reliability concerns. MISO stated that the increase was due to higher-priced bids from sellers in Zone 4.[4]

2. Prior to the 2015-2016 PRA, the Commission approved the sale of Ameren Energy Generating Company and Ameren Energy Marketing Company's direct and indirect interests in four power plants located in Zone 4 to Illinois Power Holdings, LLC ("Illinois Power Holdings").[5] Illinois Power Holdings was a subsidiary of Dynegy, Inc. ("Dynegy"), and Dynegy already owned more than 3,200 MW of capacity in the MISO region of Illinois. On October 11, 2013, the Commission allowed Dynegy to acquire a total of approximately 4,393 MW of additional capacity in Illinois, including 3,152 MW in MISO's Zone 4.[6] In 2018, Dynegy merged with Vistra Energy Corp. ("Vistra") with the new company retaining Vistra's name.[7]

3. Dynegy's purchase of this capacity made it a pivotal supplier in Zone 4 because it controlled enough unforced capacity such that it could set the clearing price in Zone 4. For the 2015-2016 PRA, MISO identified 13,481.8 MW of total unforced capacity in Zone 4 and calculated that 8,852 MW must come from within Zone 4 because of the zone's limited ability to import capacity.[8] This amount of capacity that must come from within Zone 4 was the Local

[2] McCullough Aff. ¶¶ 5–6.
[3] *Id*.
[4] *Id.* ¶ 8.
[5] *See Ameren Energy Generating Co.*, 145 FERC ¶ 61,034 (2013).
[6] *See Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,385, at ¶ 9 (2015) (hereinafter, "December 2015 Order").
[7] *See Dynegy Inc.*, 163 FERC ¶ 61,013 (2018).
[8] McCullough Aff. ¶¶ 20, 23.

Clearing Requirement ("LCR") and is what MISO considers sufficient local generation to meet MISO reliability standards. At the time, the LCR calculation did not recognize that approximately 1,200 MW of capacity located in Zone 4 but committed to load serving entities in the PJM Interconnection ("PJM") (and thus not eligible for sale in the 2015-2016 PRA) would create counter-flows bringing capacity back into MISO.[9] Dynegy controlled 6,400 MW of unenforced capacity in the zone across eight power plants after its purchase of the power plants through Illinois Power Holdings.[10] This meant that without Dynegy's capacity, there were only 7,081 MW available to meet the 8,852 MW LCR. Even if all non-Dynegy unforced capacity was offered into the 2015-2016 PRA, a capacity gap of 1,771 MW would have remained. Dynegy's market power within Zone 4 essentially allowed it to name its clearing price.

4. Thus, not surprisingly, Dynegy's bid of $150.00/MW-day set the clearing price for the 2015-2016 PRA. Not all suppliers within Zone 4 bid into the 2015-2016 auction, with cumulative bids totaling only 5,751.9 MW.[11] As a result, a gap of 2,262.5 MW remained,[12] which Dynegy filled with offers of 270 MW at $108.00/MW-day, 651 MW at $150.00/MW-day, and 2,775 MW at $167.00/MW-day.[13]

5. MISO's tariff did not mitigate Dynegy's bids. At the time, Module D of MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (the "Tariff") stated that MISO's Independent Market Monitor ("IMM") would mitigate offers if they failed a two-part Conduct-Impact Test.[14] The Conduct Test calculated an Initial Reference Level ("IRL") and

[9] *See* December 2015 Order, 153 FERC ¶ 61,385, at ¶ 108.
[10] McCullough Aff. ¶ 23.
[11] *Id.*
[12] *Id.*
[13] *Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042, at ¶ 84 (2019) (hereinafter, "July 2019 Order").
[14] MISO, FERC Electric Tariff, Module D, § 62 (30.0.0); *id.* at § 65.2.2 (30.0.0).

added to it 10% of the Cost of New Entry ("CONE").[15] The IRL was designed to approximate "the estimated opportunity cost of exporting capacity to a neighboring region."[16] The Impact Test considered whether an offer in the auction increased the auction clearing price by 10% of CONE.[17] MISO's Tariff stated that the IMM would reduce any offer down to the IRL that exceeded the sum of the IRL + 10% of CONE (the Conduct Test) and increased the auction clearing price by 10% of CONE (the Impact Test).[18]

6. MISO's IMM did not mitigate Dynegy's offer of $150.00/MW-day because it did not violate the Conduct Test. MISO's IMM set the IRL for the 2015-2016 PRA by looking to the clearing prices across PJM's locational delivery areas and then adding to that average the highest of 20 percent of the weighted average clearing price or $20.00/MW-day, while subtracting transmission costs.[19] MISO's IMM calculated an IRL of $155.79/MW-day and then set the Conduct Test threshold by adding to the reference level 10% of CONE, which summed to $180.53/MW-day.[20] Dynegy's bid of $150.00/MW-day did not exceed the Conduct Test threshold of $180.53/MW-day and thus was not mitigated down to the IRL.

7. Public Citizen; the People; Southwestern Electric Cooperative, Inc. ("Southwestern"); and the Illinois Industrial Energy Consumers ("IIEC") (collectively, the "Complainants") filed complaints at the Commission requesting that the Commission find that results of the 2015-2016 PRA were not just and reasonable and that the Commission investigate the auction results and possible market manipulation by Dynegy. The complaints were docketed as Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, and EL15-82-000, respectively.

[15] *Id.* at § 64.1.2d (32.0.0).
[16] *Id.* at § 64.1.4 (30.0.0).
[17] *Id.* at § 64.2.1 (34.0.0).
[18] *Id.* at § 65.2.2. (30.0.0).
[19] December 2015 Order, 153 FERC ¶ 61,385, at ¶ 28.
[20] *Id.*

A. December 31, 2015 Order

8. The Commission resolved the Complainants' allegations through two orders. The first order, issued on December 31, 2015 ("December 2015 Order"), granted the complaints in part and denied the complaints in part, and mandated that MISO make compliance filings to implement revisions to its Tariff. This order, however, only considered prospective changes to MISO's Tariff and did not resolve the Complainants' allegations of market manipulation. With respect to the market manipulation issues, the Commission stated in the order that:

> [T]he Commission's Office of Enforcement is conducting a formal, non-public investigation into whether market manipulation occurred before or during the 2015/16 Auction. The Commission will determine in a subsequent order whether and what further action may be appropriate pending the outcome of the formal investigation, and the findings in this order do not prejudge the findings of this investigation.[21]

9. In the December 2015 Order, the Commission first concluded that MISO's market power mitigation provisions were no longer just and reasonable. The Complainants argued that the IRL was faulty as a measure of opportunity cost because the calculations did not determine what a parallel offer in PJM would likely be. For example, Dynegy submitted substantially lower capacity offers in corresponding PJM auctions for the same generating units it also offered in the 2015-2016 PRA.[22] Moreover, there was limited transmission capability between Zone 4 and PJM, further suggesting that the IRL did not properly measure opportunity cost since generators had a limited ability to bid into PJM.[23]

[21] *Id.* ¶ 4.
[22] McCullough Aff. ¶ 31.
[23] December 2015 Order, 153 FERC ¶ 61,385, at ¶ 59.

10. The Commission agreed that the IRL, as calculated, "does not represent an appropriate default opportunity cost for all MISO capacity resources."[24] The Commission stated that PJM's auctions were changing in a way that made MISO's PJM-based opportunity cost calculation less representative of a true legitimate alternative opportunity. Specifically, the Commission pointed to the following issues:

a. First, the Commission approved PJM's Capacity Performance construct in June 2015, under which generators would receive a capacity payment based on the results of the PJM capacity auction, plus additional payments or penalties based on generator performance during peak hours. PJM planned to fully transition to this pricing model for the 2020-2021 planning year, with a planned Spring 2017 auction. The Commission stated that once the transition was complete that "PJM and MISO will be procuring different capacity products" because PJM capacity revenues would reflect both a capacity payment and an expectation of performance payments or penalties, whereas MISO would procure capacity without any performance payments or penalties.[25]

b. Second, the Commission noted that there are physical barriers preventing the sale of capacity from MISO to PJM. In the 2014-2015 planning year, generators requested to send 3,650 MW of monthly capacity from PJM to MISO. Only 200 MW were ultimately approved. Moreover, only 8,103 MW of Total Transfer Capability existed between MISO and PJM.[26]

[24] *Id.* ¶ 86.
[25] *Id.* ¶ 88.
[26] *Id.* ¶ 89.

c. Third, the Commission stated that the IRL was only appropriate in situations where MISO generators sell replacement capacity into PJM. This was a small market because of "limited demand for replacement capacity in PJM and the limited ability to attain transmission service from MISO to PJM."[27]

11. To address these issues, the Commission ordered that MISO amend its Tariff to set its IRL at $0.00/MW-day. The result of this change was that all resources that wished to submit bids that exceeded the Conduct Test threshold (now, $0.00/MW-day + 10% CONE, or approximately $25.00/MW-day) must obtain facility-specific reference levels or else possibly be mitigated under the Conduct-Impact Test. A facility could only obtain a facility-specific reference level if it could show that its going-forward costs exceeded the Conduct Test threshold.[28]

12. Second, the Commission concluded that MISO's Tariff was unjust and unreasonable because it improperly calculated the Capacity Import Limit (and, by extension, the LCR) by failing to properly recognize counter-flows created by capacity exports.

13. MISO's Tariff required it to establish a Local Reliability Requirement, Capacity Import Limit, and Capacity Export Limit for each zone by November 1 of the planning year for the purpose of determining how much capacity a zone needed to ensure reliability with existing transmission limitations.[29] MISO calculated the LCR by subtracting from the Local Reliability Requirement the Capacity Import Limit (i.e., LCR = Local Reliability Requirement – Capacity Import Limit).[30] The Tariff defined the LCR as "the minimum amount of Unforced Capacity

[27] *Id.* ¶¶ 90–91.
[28] *Id.* ¶¶ 93–94.
[29] *Id.* ¶¶ 102–03.
[30] *Id.* ¶ 104.

that is physically located within [a zone] that is required to meet the [Loss of Load Expectation] while fully using the Capacity Import Limit for such [zone]."[31]

14. The Complainants alleged that MISO miscalculated the Capacity Import Limit (and, by extension, the LCR) because MISO did not consider counter-flows created by the export of approximately 1,200 MW of capacity from MISO into PJM that were sold into PJM during its 2015-2016 auction. The IIEC alleged that the export of this capacity created counter-flows that brought an equivalent amount of electricity back into MISO and thus should be considered in calculating the LCR. It further alleged that if the counter-flows were counted in the LCR, the clearing price for Zone 4 in the 2015-2016 PRA would have been $8.00/MW-day.[32]

15. The Commission concluded that MISO's Tariff was unjust and unreasonable because its LCR calculation failed to properly recognize counter-flows created by capacity exports, thereby impermissibly inflating how much capacity had to come from Zone 4. The Commission ordered MISO to adopt the proposal of MISO's IMM, who had proposed a Capacity Import Limit calculation that properly recognized counter-flows, and to amend the Capacity Import Limit that was scheduled to be used for the 2016-2017 PRA.[33] The Commission did not require MISO to alter the results of the 2015-2016 PRA using the IMM's proposed counter-flows methodology.

B. July 19, 2019 Order

16. Thereafter, the Commission entered its second order in this proceeding on July 19, 2019, where it denied the remaining complaints. Specifically, the Commission declined the

[31] MISO, FERC Electric Tariff, Module A, § 1.L (34.0.0).
[32] December 2015 Order, 153 FERC ¶ 61,385, at ¶ 108.
[33] *Id.* ¶ 148.

Complainants' request to hold an evidentiary hearing regarding the 2015-2016 PRA and declared that the results of the auction were just and reasonable.[34] Moreover, the Commission determined that Dynegy's conduct did not violate the Commission's market manipulation regulations and informed the parties that it had closed its market manipulation investigation.[35]

17. The Commission stated that Dynegy did not engage in market manipulation because its offers complied with the then operative market power mitigation provisions of the Tariff, which had previously been approved by the Commission as a just and reasonable approach to mitigating anticompetitive behavior in the capacity auctions.[36] In other words, the Commission concluded that the results of the 2015-2016 PRA for Zone 4 were just and reasonable, even with a clearing price more than 40 times higher that of the other zones, because MISO conducted the auction in line with its faulty Tariff and Dynegy did not violate any rule contained in the faulty Tariff. The Commission made no attempt to reconcile this holding with its conclusion from the December 2015 Order that the Tariff's market power mitigation provisions were no longer just and reasonable, and that MISO's Tariff incorrectly calculated the Capacity Import Limit, thereby improperly increasing the LCR.

18. Chairman Glick, then a Commissioner, issued a dissent disputing the Commission's ruling. He explained that the Commission's rationale for its decision was "wholly unsatisfactory" because the Commission found that the results of the 2015-2016 PRA were just and reasonable only because Dynegy complied with the Tariff; however, the Commission had stated in the past that parties can still engage in market manipulation <u>even if they comply with the language of an applicable tariff</u>.[37] Thus, the only rationale for the Commission's decision

[34] July 2019 Order, 168 FERC ¶ 61,042, at ¶ 2.
[35] *Id.* ¶¶ 30, 32.
[36] *Id.* ¶¶ 85–86.
[37] July 2019 Order, 168 FERC ¶ 61,042, at ¶¶ 2, 5 (Glick, Comm'r, dissenting).

was that it did not believe that Dynegy engaged in market manipulation. But the Commission did not fully explain how it reached this conclusion because it did not disclose the results of the terminated non-public investigation. As a result, he concluded:

> Today's order does not provide even the scantest reasoning to support its finding that the nearly 1,000 percent year-over-year increase in the MISO Zone 4 capacity price had nothing to do with market manipulation. Instead, all we have is the Commission's unsubstantiated assurance that no one violated the Commission's regulations regarding market manipulation.[38]

19. Public Citizen appealed to the United States Court of Appeals, which issued an order remanding the case on August 6, 2021.[39]

[38] *Id.* ¶ 5 (footnotes omitted).
[39] *Pub. Citizen, Inc. v. Fed. Energy Regulatory Comm'n*, 7 F.4th 1177 (D.C. Cir. 2021).